89-1158

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES
October Term 1989

STATE OF FLORIDA,

Petitioner,

v.

DOY JAMES CHRISTIAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

QUESTION PRESENTED

1. WHETHER THE FLORIDA SUPREME COURT, IN REVIEWING A SENTENCE OF DEATH PURSUANT TO **TEDDER v. STATE**, 322 So.2d 908 (Fla. 1975), MAY RELY UPON VICTIM IMPACT EVIDENCE IN EXPRESS VIOLATION OF **BOOTH v. MARYLAND**, 482 U.S. 486 (1987).

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DOY JAMES CHRISTIAN,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

The Petitioner, State of Florida, respectfully prays for issuance of a writ of certiorari to review the final judgment and opinion of the Supreme Court of Florida entered on September 28, 1989, with rehearing denied on November 6, 1989.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as **Christian v. State**, 550 So.2d 450 (Fla. 1989). The opinion is reproduced in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE AND FACTS

Doy James Christian was an inmate in the Florida State Prison. Christian had a long and violent criminal history, with convictions for aggravated assault (1975), robbery (1976), and aggravated battery (1983). (R 1442-1447). In prison, Christian had an equally evil disciplinary record for conspiracy, fighting, possession of illegal weapons and assaults. (R 1457).

Christian and his victim, an inmate named Moore, were playing cards for money. (R 1194). Christian won all of Moore's money and agreed to let Moore try to recoup his losses by wagering two bars of soap. (R 1194). Moore won the hand, but Christian (who was much larger than Moore) accused Moore of cheating and simply took the soap. (R 1195). Moore went to Christian's cell to talk

to Christian about the game, but was told by Mr. Christian to forget about the game. (R 1196).

Later that day, Moore hit Christian in the head with a curling bar as Christian was playing cards. (R 1197). Christian was taken to a clinic for observation but required no treatment. He was there for about a day and a half. (R 1198).

Moore, on the other hand, was locked away in "close" (solitary) confinement so that he could not injure Christian again.

Christian returned to population on "M" wing.

Moore, who was on the wing but locked up in close confinement, yelled threats at Christian (R 1209), and Christian, in turn, threatened Moore. (R 832). Moore could not get to or harm Christian.

On May 2, 1987, Moore was shackled by the prison guards, who began escorting him to the infirmary. (R 781 - et.seq.).

Doy Christian had planned for this moment. (R 1220). Earlier, Christian had gone to an inmate named "Hubcap" and obtained a knife. (R 1225). As Moore was led from his cell, Christian fetched his knife from its hiding place. (R 1215).

Christian rushed the handcuffed Moore, brushing past the unarmed guards as the incapacitated victim tried to run for his life. When Moore was caught by Christian, an incredible assault began. (R 791-792). As Moore begged for his life, Christian spat in his face. (R 920). Christian then methodically began cutting a circular pattern in Moore's chest. (R 939-940). Christian stabbed

Moore's eyes and returned to stabbing Moore's chest. (R 945-946). When he was through stabbing Moore, Christian threw Moore's body off of the third floor balcony where the attack took place, dropping (the still alive) victim to his death, crushing his skull. (R 847, 886).

Christian attempted to attribute the murder to his head injury, but an expert, Dr. Aviles, testified that an untreated blow to the head sufficient to cause a personality change would have killed Christian before the murder. (R 1126). Dr. Krop, Christian's expert, said that Christian may have had impaired judgment due to emotional stress (R 1538-1552), but he was not psychotic (R 1548), and fully appreciated the criminality of his conduct. (R 1550). Dr. Krop also

rejected Christian's self-serving "blackout" theory. (R 1538).

The advisory jury recommended a life sentence for Christian[1] following his conviction. The trial judge imposed an "override" sentence of death, finding these four aggravating factors:

(1) Christian committed this murder while under sentence.

(2) Christian had prior convictions for violent felonies.

(3) The murder was especially heinous, atrocious or cruel.

(4) The murder was cold, calculated and premeditated without any pretense of moral or legal justification. (R 1665-1670).

In sentencing Christian, the trial court rejected Mr. Christian's claim

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[1] The vote was a close, 7-5 election. See (R 1670).

that the character of the victim and the fact that the victim was a convict were sufficient mitigating factors to excuse this killing. (R 1670).

Mr. Christian appealed to the Supreme Court of Florida, raising three claims:

(1) The trial court's exclusion of lay opinion testimony offered, in part, to offset expert psychiatric testimony regarding the affect of Christian's head wound.

(2) The propriety of the override sentence given the "social pressure" on Christian to kill a rival inmate.[2]

(3) The propriety of the finding that this murder was heinous, atrocious or cruel.

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[2] Mr. Christian contended, on appeal, that the social pressure on Christian to eliminate Mr. Moore was a "pretense' of moral and legal justification for this murder. (Brief of Appellant, pp. 36, et seq.).

While Mr. Christian's appeal was pending, the Florida Supreme Court somehow obtained non-record files including records of some "special investigation" by the Florida Department of Corrections regarding this murder. By letter dated December 27, 1988, the Court invited counsel to respond to the question of whether these non-record materials could be used. (App.-page 3). Both the State and Mr. Christian objected to the use of non-record materials. (App.-page 2). Based upon these objections, the Court represented to counsel that the non-record information would not be used. (App.-page 1).

When, on September 28, 1989, the Court published its opinion affirming Christian's conviction by vacating his sentencing, the parties discovered that

the state court had, in fact, relied upon non-record information and had even gone so far as to cite to it at the end of the court's opinion. (App.-pages 14, 15).

The State notified defense counsel and then moved for rehearing. Defense counsel stood mute, but the court denied relief without denying it had used non-record material.

The opinion itself (at least the majority opinion) does not discuss the facts of the crime or relate them to the four valid statutory aggravating factors. Rather, the opinion reads as a massive character study of the victim, explaining why he "had" to be killed by Christian to preserve Christian's social standing and peace of mind while in prison.

In a stinging dissent, Justice McDonald (alone) discussed the facts of the crime and the nature and character of the defendant without engaging in victim-impact review. The State moved for rehearing, citing **Booth v. Maryland**, 482 U.S. 496 (1987), but was again denied relief.

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT, IN RESENTENCING MR. CHRISTIAN, VIOLATED THE PRECEPTS OF **BOOTH v. MARYLAND** BY BASING ITS SENTENCE EXCLUSIVELY ON THE CHARACTER AND REPUTATION OF THE VICTIM.

In **Booth v. Maryland, supra,** and in **South Carolina v. Gathers,** 490 U.S. ____, 104 L.Ed.2d 876 (1989), this Honorable Court reaffirmed the basic notion that a sentencing decision in a capital case must focus upon the nature of the crime committed and upon the characteristics of the defendant. So-called "victim impact" evidence or evidence relevant to the character and history of the victim is, with limited exception,[3] irrelevant.

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[3] Florida recognizes as "mitigating" the involvement of the deceased in bringing about his demise in cases of actual self-defense.

In resentencing Mr. Christian on the strength of secret prison investigative files, the majority of the Florida Supreme Court reversed a capital sentencing decision that properly focused itself on the defendant and his crime and substituted therefor a new sentence which focused exclusively upon the character of the victim. If **Booth** and **Gathers** mean what they say, then constitutional error of proportions sufficient to compel certiorari review is present, for the decision to grant life cannot be predicated upon the fortuitous murder of a "bad" victim any more than a death sentence cannot be based upon the demise of a "good" person.

The murder at bar was cruel and vicious, yet the curious decision of the Florida Supreme Court does not even

mention the facts or circumstances of the murder. Instead, the five page majority opinion tells us what a bad criminal record Alfred Moore had, how Moore "cheated at cards", how Moore hated Christian, how Moore yelled threats at Christian, how Moore once attacked Christian, how Moore, at other jails, had behaved badly and how Moore's misconduct gave Christian a "pretense of moral justification" for the murder that followed.

We must re-examine that "pretense" just as Justice McDonald did in dissent.

Christian and Moore fought over a card game. Christian, who was bigger than Moore, accused Moore of cheating but Moore's "cheating" was never proven. (The majority just assumed Moore cheated on Christian's word). It was Christian who forcibly took Moore's soap (the wager) after the smaller man had won.

Moore hit Christian, but all of the medical experts agreed that the blow was not serious enough to alter Christian's personality. The Florida Supreme Court, on a cold transcript, ignored all the experts in favor of some inmate testimony that favored Christian's claim that he "changed".

Christian and Moore **exchanged** verbal threats. Moore did not, alone, threaten Christian.

Moore was locked up in disciplinary confinement and had no physical ability to get to or injure Christian. Christian's existence was not endangered by the verbal retorts of a man locked in a solitary cell.

On the day of the murder, the victim was unarmed, handcuffed and under restraint from two prison guards two floors above Doy Christian. He posed no threat.

Christian retrieved a knife, stalked Moore, chased Moore and killed Moore.

The methodical, circular, dissection of Moore's chest, the stabbing of Moore's eyes, the spitting in Moore's face and the dropping of the (still alive) Mr. Moore off of the third floor walkway - done while the handcuffed victim pled for his life - again draws Mr. Christian's conduct - not Moore's character - into question.

The majority opinion describes the actual murder in two sentences while describing Moore's fate merely as death by "multiple stab wounds and blunt trauma head injuries". The four statutory aggravating factors are listed in a small footnote.

The need for application of **Booth** to this situation should be obvious. This murder took place in a prison. By their

nature, prisons are populated by less than respectable people, including people with violent histories and propensities. Still, inmates are living human beings. They deserve the protection of society's laws. Their lives are not subject to forfeiture at whim, nor are their lives less worthy of legal protection, just because they are currently in prison.

By stretching the concept of "pretense" (of moral or legal justification) into leave to put the victim on trial, the Florida Supreme Court has radically shifted the focus of the capital sentencing process from the defendant to the victim. In the process, the Court has cheapened the value of those lives caught up in the prison system. While the "value" of those lives may not be a federal

constitutional issue, the shifting of the focus of the sentencing process certainly is.

The **Booth** ramifications are even more sinister. A divided Supreme Court, with sympathy for the victims of crime, nevertheless was lawfully obliged to exclude "victim impact evidence" from the capital sentencing process. Now, victims stand to be told that evidence of their good character will be inadmissible but that the defense will be free to put their "bad" character on trial. Such a result, we suggest, is an interpretation of **Booth** which justifies the intervention of the Court under Rule 17.

Mr. Christian, not Mr. Moore, was the person on trial. If the Florida Supreme Court had based a decision affirming Christian's death sentence on a

favorable character analysis of the victim, especially on the strength of nondisclosed evidence, the defense would demand review. The error and the need for review is no less severe under the existing facts.

CONCLUSION

It is respectfully submitted that certiorari should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Asst. Attorney General

DEPT. OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

SUPREME COURT OF FLORIDA

Wednesday
January 18, 1989

DOY JAMES CHRISTIAN,	*	
	*	
Appellant,	*	
	*	CASE NO. 71,636
v.	*	
	*	
STATE OF FLORIDA,	*	Circuit Court No.
	*	87-195 CF
Appellee.	*	(Bradford)
	*	

* * * * * * * * * * * *

The Court having received comments from both parties concerning the Special Investigation done on appellant,

IT IS ORDERED by the Court that this document be returned to the Department of Corrections.

A True Copy

TEST

Sid J. White
Clerk,
Supreme Court

TC
cc: Hon. Richard Dugger
David Davis, Esq.
Mark Menser, Esq.

OFFICE OF THE ATTORNEY GENERAL
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050

January 5, 1989

Mr. Sid White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

RE: Doy James Christian v. State
Case No. 71,636
Circuit Court Case No. 87-195 CF

Dear Mr. White:

In response to the Court's inquiry of December 27, 1988, this office suggests that the Special Investigation from the Department of Corrections should not be reviewed or considered by the Court.

The State believes that non-record material should not be considered, particularly where said material contains irrelevant and potentially prejudicial material.

We understand that Mr. Davis has also assumed this position on Mr. Christian's behalf and, therefore, that the parties

agree that the Investigation should not be considered.

Sincerely,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General

MCM:lmb

SUPREME COURT OF FLORIDA
Tallahassee 32399-1927

December 27, 1988

David A. Davis, Esq.
Asst. Public Defender
P.O. Box 671
Tallahassee, FL 32302

RE: Doy James Christian v. State
Case No. 71,636
Circuit Ct. Case No. 87-195 CF

Dear Mr. Davis:

This Court is in receipt of a copy of the Special Investigation from the Department of Corrections in the above case. We are not sure whether the trial judge saw this report or not so the Court invites comments from both parties on this matter on or before January 9, 1989. Please come by the Clerk's Office to view this report.

Most cordially,

By: /s/ Debbie Causseaux
Chief Deputy Clerk

Sid J. White
Clerk Supreme Court

SJW:dec
cc: Mark Menser, Esq.

SUPREME COURT OF FLORIDA

No. 71,636

DOY JAMES CHRISTIAN, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[September 28, 1989]

PER CURIAM.

Doy Christian appeals his conviction of first-degree murder and sentence of death. We have jurisdiction. Art. V, §3(b)(1), Fla.Const. We affirm the conviction, but vacate the sentence and remand for the imposition of a life sentence in accordance with the jury's recommendation.

On April 12, 1987, Christian and the victim of this crime, another inmate at

Florida State Prison named Alfred Moore, were playing cards. Christian was winning. Moore wagered two bars of soap and then attempted to cheat in an effort to regain what he had lost. Christian, however, caught Moore and took the two bars of soap. Under the inmate "code," anyone caught cheating at cards lost his entire wager.

Later that day, Moore was still harboring an insane hatred of Christian over the incident. Sneaking up behind Christian, Moore brandished a forty-pound curling iron used by weight lifters and smashed it into Christian's head, knocking him unconscious immediately. Moore would have continued pounding Christian had another inmate not intervened. Even then, Moore begged the other inmate to release him so he could kill Christian. Christian

suffered a deep head wound, requiring stitches and two days of observation.

Moore's violence toward Christian did not end with the attack. For the next few weeks, Moore mounted a constant barrage of threats at Christian and threatened to kill Christian's parents when he was released from prison. He threatened to inflict further injury on Christian, promised he would kill Christian sooner or later, and made repeated suggestions that Christian would be forced to become his homosexual object. These threats continued up until the day of Moore's death.

Three weeks after Moore's initial attack on Christian, Christian took matters into hi own hands. When Moore was being escorted in handcuffs through the prison by two unarmed guards, Christian managed to shove the guards

aside and attack Moore with a knife that Christian previously had hidden. Christian then pushed Moore off a third-floor deck. Moore died of multiple stab wounds and blunt trauma head injuries. A jury convicted Christian of first-degree murder and recommended a sentence of life imprisonment. However, the trial judge found four aggravating factors* and none in mitigation and sentenced Christian to death.

In this appeal, Christian first argues that the trial court erred in excluding testimony tending to prove he lacked the mental ability to form specific intent. Specifically, defense

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* Committed by person under sentence of imprisonment; previous conviction of violent felony; heinous, atrocious, or cruel; and cold, calculated, and premeditated with no pretense of moral or legal justification. §921.141(5)(a), (b), (h), (i), Fla.Stat. (1987).

defense counsel had attempted to introduce testimony by several inmates that Christian's mental condition changed following Moore's attack, possibly as a result of head injuries. This argument essentially is in the vein of "diminished capacity," a defense recently rejected in Florida. **Chestnut v. State**, 538 So.2d 820 (Fla. 1989). Accordingly, the trial court's ruling was proper on this issue.

After examining the arguments of counsel and conducting an independent review of the record, we find that there was sufficient evidence to support Christian's conviction, which we affirm.

As to the penalty, Christian first argues that the trial court erred in finding that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or

legal justification." §921.141(5)(i), Fla.Stat. (1987). Christian contends that even if his actions demonstrated calculation, they nevertheless were based on at least a "pretense of moral or legal justification."

In **Cannady v. State**, 427 So.2d 723 (Fla. 1983), this Court addressed the issue of what constitutes a "pretense" of moral or legal justification. We found that Cannady had such a pretense because, during his confessions, he repeatedly stated that he never intended to harm the victim. The evidence corroborated these statements, since it showed that Cannady had shot the victim only after the victim jumped at him. There was no evidence to disprove these contentions.

Similarly, in **Banda v. State**, 536 So.2d 221 (Fla. 1988), cert. denied, 109

S.Ct. 1548 (1989), we also found a pretense of justification. There, we were swayed by evidence of the victim's violent nature and apparent ability to harm Banda, which caused a plausible fear in Banda that the victim would try to kill him. We then concluded that a "pretense" of moral or legal justification could consist of any "colorable" claim . . . that [the] murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime." Id. at 225.

On the other hand, this Court has upheld a finding of no pretense of justification in a prison killing when the victim was attacked by surprise and repeatedly stabbed, when there was no evidence the victim had engaged in prior threatening acts. Williamson v. State,

511 So.2d 289 (Fla. 1987), cert. denied, 108 S.Ct. 1098 (1988).

In the present case, we find ample evidence showing that Christian had at least a "pretense" of moral or legal justification. As in **Banda**, this record discloses at least a colorable claim that the murder "was motivated out of self-defense," although in a form legally insufficient to serve as a defense to the crime. Indeed, this record is replete with unrebutted evidence of the victim's threats of violence to Christian and his apparent inclination to fulfill them. This is corroborated by the fact that during his incarceration in Palm Beach County prior to his transfer to Florida State Prison, Moore had engaged in more than a hundred incidents that included several arsons, attacks on nineteen deputy sheriffs and

a nurse, a suicide attempt, and several attempted escapes. Christian's attack on Moore was preceded by three weeks of constant harassment and threats. There was expert medical testimony that Moore's actions against Christian effected a psychological change in Christian. Prior to the battery by Moore, he was friendly and outgoing. Subsequent to it he was withdrawn and brooding. During the commission of the homicide fellow prisoners described him as being in a daze, or acting as though he was out of it. While this does not negate his guilt, it is a permissible additional factor for the jury to consider when making its recommendation. Moore's hatred of Christian had begun with a homicidal attack that would have succeeded had other inmates not intervened. The extreme behavior of

Moore is only underscored by the fact that Moore decided to kill defendant over the loss of two bars of soap in a wager.

We find the present facts establish a "pretense" of moral and legal justification more strongly than those in **Banda**. Accordingly, the trial court erred in finding in aggravation that the murder was cold, calculated, and premeditated and without pretense of legal or moral justification.

Second, Christian argues that sufficient mitigating evidence existed to support the jury's recommendation, notwithstanding the judge's finding to the contrary. We agree.

Certainly the facts of the murder fully support a conviction of first-degree murder. But the facts just recited, particularly those contained in

the prison's own records, bear out and support the jury's recommendation of life in this instance. Moore was a violent man who had attacked Christian in a homicidal rage and had continued to make threats up to the time Christian killed Moore. We cannot say that a jury would be unreasonable in weighing this evidence in mitigation and concluding that death was not the appropriate penalty.

Accordingly, we vacate the sentence of death and remand for imposition of life imprisonment under **Tedder v. State**, 322 So.2d 908 (Fla. 1975), where we stated:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

McDONALD, J., Dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting.

Christian and Alfred Moore, inmates at Florida State Prison, did not get along with one another. On April 12, 1987, after Christian accused him of cheating during a card game, Moore hit Christian in the head with a metal weight-lifting bar. Three weeks later, while still under close detention for the attack on Christian, Moore visited the infirmary. Christian, knowing that Moore would be out of his cell, retrieved a knife which he had previously hidden. While two unarmed guards escorted the handcuffed Moore back to his cell, Christian pushed the guards aside, chased after Moore who had started running, caught him, stabbed him twenty-six times, and pushed him off a third-floor deck. Moore died of multiple stab wounds and blunt trauma

head injuries. A jury convicted Christian of first-degree murder and recommended a sentence of life imprisonment. Finding four aggravating factors[1] and none in mitigation, however, the trial court, in a comprehensive and analytical order, overrode the jury's recommendation and sentenced Christian to death.

One of the statutory aggravating factors is that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." §921.141 (5) (i), Fla. Stat. (1987).

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[1] Committed by person under sentence of imprisonment; previous conviction of violent felony; heinous, atrocious, or cruel; and cold, calculated, and premeditated with no pretense of moral or legal justification. §921.141(5)(a), (b), (h), (i), Fla.Stat. (1987).

Christian argues that his actions did not rise to the level needed to be found to be cold, calculated, and premeditated. In the alternative he argues, and the majority agrees, that even if his actions met the first part of the statute, he had a pretense of moral or legal justification for committing the murder.

Simple premeditation which might be sufficient to support a conviction of premeditated first-degree murder is not sufficient to support the aggravating circumstance at issue. **Jent v. State**, 408 So.2d 1024 (Fla. 1981), **cert. denied**, 457 U.S. 1111 (1982). Instead, heightened premeditation, demonstrated by the method and manner of the killing, is required. **Hamblen v. State**, 527 So.2d 800 (Fla. 1988). Murders which can be characterized as executions fit

within that definition. **Routly v. State**, 440 So.2d 1257 (Fla. 1983), **cert. denied**, 468 U.S. 1220 (1984); **McCray v. State**, 416 So.2d 804 (Fla. 1982). This aggravating factor can be shown by "advance procurement of a weapon, lack of provocation, and the appearance of a killing carried out as a matter of course." **Swafford v. State**, 533 So.2d 270, 277 (Fla. 1988), **cert. denied**, 109 S.Ct. 1578 (1989).

As stated in the sentencing order, Christian brooded over Moore's attack on him, secured a knife, knew that Moore would be handcuffed while outside his cell,[2] retrieved his contraband knife

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[2] Moore was still under close restraint because of the attack on Christian and could be outside his locked cell only when handcuffed and escorted by guards. Christian, however, like other inmates not under close restraint, had the run

from its hiding place when he knew that Moore was out of his cell, followed Moore and the guards upstairs, refused to heed Moore's cries for mercy and the guards' orders to stop, stabbed Moore twenty-six times while chasing him around the third floor, and, finally, pushed him off the third-floor deck to the concrete surface of the first floor. The record supports these conclusions. Christian testified that he obtained the knife for protection. Retrieving the weapon from its hiding place and stalking Moore, when he knew Moore would be out of his cell and, therefore, accessible, but defenseless because of

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[2] (continued)

of the building and could come and go as he wished.

the handcuffs, however, demonstrates an offensive, rather than a defensive, motivation. Moreover, although Moore had verbally abused Christian, due to his being under close confinement, he had no present ability to make good any threats. Rather than provoking the attack that killed him, Moore tried to run away from Christian. Two inmates locked in their third-floor cells within feet of Christian's attack on Moore testified on the state's behalf. They stated that Moore tried to evade Christian and begged for his life, that Christian spat in Moore's face before stabbing him in the eyes, that the unarmed guards tried to beat Christian away from Moore with their walkie-talkie, that Moore was still alive when

Christian stopped stabbing him,[3] that guards could be heard approaching, that several inmates urged Christian to ease up because it was obvious that he was going to push Moore off the third floor, and that Christian had to lift Moore to clear a three-inch ledge before shoving him over the side. The evidence shows this killing to have been a methodical execution and that Christian fully intended to kill, rather than just injure, Moore. The trial court properly found Christian's conduct to be cold, calculated, and premeditated. Thus, the critical factor is whether Christian had a pretense of moral or legal justification.

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[3] The medical examiner agreed and testified that, in his opinion, Moore was still alive until he hit the floor.

In **Cannady v. State**, 427 So.2d 723 (Fla. 1983), this Court found that Cannady had at least a pretense of moral or legal justification because during his confessions he repeatedly stated that he never intended to harm the victim, whom he shot only after the victim jumped at him, and no evidence to disprove these contentions existed. Similarly, in **Banda v. State**, 536 So.2d 221 (Fla. 1988), **cert. denied**, 109 S.Ct. 1548 (1989), we found a pretense of justification because the victim's violent nature and apparent ability to harm Banda caused a real fear in Banda that the victim would kill him. On the other hand, this Court upheld a finding of no pretense of justification in a prison killing where the victim engaged in no threatening acts prior to his being attacked by surprise and

repeatedly stabbed. **Williamson v. State**, 511 So.2d 289 (Fla. 1987), **cert. denied**, 108 S.Ct. 1098 (1988). Although Moore had threatened Christian, he had no chance to act on those threats due to his being in close confinement. This is a distinguishing factor from **Banda**. Banda was exposed to immediate danger from his victim. Anticipatory retaliation when no present danger existed cannot justify Christian's actions. The evidence leads to the conclusion that Moore's being out of his cell and, therefore, accessible, rather than Moore's actions or threats, prompted the immediate attack on him.

In rejecting Christian's pretense of justification theory the trial court stated:

> At the outset in consideration of this element this Court is well aware that arguments may be made, by

> some, and in fact were made by able counsel for the defense in this case, that this murder somehow must not fall within the category of those deserving the death penalty because of the prior attack by the victim on the defendant and also because of some special consideration that should be given to prisoners who perceive their status somehow threatened if they do not retaliate. Such argument and position are absolutely repugnant to this Court and cannot be rationalized by an informed society that truly wishes to preserve human life. If the retribution by defendant is to be classified as having any pretense of moral or legal justification, then the lives of all prisoners and others are in jeopardy at the hands of those so inclined to vengeance.

I agree that some of society's most violent members reside in our prisons, but to find that Christian had even a pretense of moral or legal justification in killing Moore would be to condone the creation of an open season by inmates on their fellow inmates with whom they have had arguments of physical encounters.

Neither do I agree that the trial court erred in overriding the jury's recommendation of life imprisonment. A jury recommendation must be given great weight under our death penalty statute. **Tedder v. State**, 322 So.2d 908 (Fla. 1975). "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." **Id.** at 910. If the jury's recommendation is not based on valid mitigating circumstances which can serve as a reasonable basis for that recommendation, however, a life recommendation can be overridden. **Thomas v. State**, 456 So.2d 454 (Fla. 1984). **See Mills v. State**, 476 So.2d 172 (Fla. 1985), **cert. denied**, 475 U.S. 1031 (1986). In fact, if a death

sentence is appropriate, i.e., supported by aggravating evidence, and "some matter not reasonably related to a valid ground of mitigation has swayed the jury to recommend life, such as through emotional appeal, prejudice, or some similar impact, it is proper for the judge to overrule the jury's recommendation." **Thomas**, 456 So.2d at 460.

Christian claims that, because of the inmate code of justice by which inmates solve their own problems, the prison administration's indifference, and Moore's conduct, the jury administration's indifference, and Moore's conduct, the jury reasonably could have concluded that Christian had to kill Moore before he killed Christian. As discussed above, Christian had no legal or moral

justification for killing Moore. Allowing inmates to kill one another because they are inmates makes the application of the death penalty arbitrary and cannot be a reasonable basis for a jury's recommending life imprisonment. **Compare Bolender v. State**, 422 So.2d 833 (Fla. 1982) (the victims' being armed cocaine dealers does not justify robbing, torturing, kidnapping, and murdering them), **cert. denied**, 461 U.S. 939 (1983). **See also Burch v. State**, 522 So.2d 810, 815 (Fla. 1988) (Shaw, J., concurring in part, dissenting in part).

Citing **Lusk v. State**, 446 So.2d 1038 (Fla.), **cert. denied**, 469 U.S. 873 (1984), Christian argues that his death sentence is disproportionate as another facet of his claim that the jury's recommendation should not have been

overridden. Lusk, like Christian, killed a fellow inmate who had threatened him, and Lusk's jury also recommended life imprisonment for him. Because this Court mentioned, 446 So.2d at 1043, that Lusk committed that murder while serving three life sentences for armed robbery and first-degree murder, Christian urges that Lusk had a propensity to kill which Christian does not. Christian admits, however, that he has a violent background. When he killed Moore, he was serving a thirty-year sentence for armed robbery and aggravated assault. In 1983 he was convicted of another aggravated assault while in prison, and had been the subject of several disciplinary reports, mostly for fighting. Additionally, Moore, unlike Lusk's victim, had, due to being under close confinement, no

present ability to effectuate his threats.

That we found Lusk deserving of the death penalty does not mean that Christian is not so deserving. The trial court properly found that four aggravating circumstances had been established and, after considering all the mitigating evidence, determined that it did not outweigh these aggravating circumstances. The jury could not have based its recommendation on valid mitigating considerations. Therefore, the trial court's sentencing Christian to death represents a reasoned judgment based on the circumstances of this murder and Christian's character, and the trial court properly overrode the jury's recommendation.

An Appeal from the Circuit Court in and for Bradford County,

Osee R. Fagan, Judge-Case No. 87-195 CF

Michael E. Allen, Public Defender and David A. Davis, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Mark C. Menser, Assistant Attorney General, Tallahassee, Florida,

for Appellee.